

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Skybridge Spectrum Foundation Freedom of	)	FOIA Control No. 2010-379
Information Act Request	)	
	)	
Maritime Communications/Land Mobile LLC	)	File No. 0002303355
Form 601 Application for Auction No. 61	)	
	)	
Order to Show Cause, Hearing Designation	)	FCC 11-64
Order, and Notice of Opportunity for Hearing	)	EB Docket No. 11-71
	)	

To: Marlene H. Dortch, Secretary, Office of the Secretary  
Attn: Chief, Wireless Telecommunications Bureau  
Attn: General Counsel, Office of General Counsel  
Attn: Chief FOIA Officer, FCC FOIA Office  
Cc: Hon. Richard L. Sippel, Chief Administrative Law Judge  
Cc: Chief, Enforcement Bureau

Consolidated Reply to Responses

Skybridge Spectrum Foundation (“SSF” or “Skybridge”)<sup>1</sup> hereby provides this consolidated reply (the “Reply”) to the Maritime Communications/Land Mobile LLC (“MCLM”) response (the “MCLM Response”), the Wireless Properties of Virginia, Inc. (“WPV”) response (the “WPV Response”) and MariTel, Inc. (“Maritel”) response (the “Maritel Response”) (together, the “Responses”) (MCLM, WPV and Maritel collectively, the “Investigated Parties”) to the FCC’s May 19, 2011 letters (the “Letters”) addressed to each party regarding release of certain alleged confidential information filed by the Parties with the FCC under SSF’s FOIA request Control No. 2010-379 (the “Request” or the “FOIA Request”) for

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<sup>1</sup> Herein, “Petitioners” means Skybridge along with the LLCs managed by Warren Havens that support Skybridge economically; all of which challenge MCLM’s File No. application captioned above and are parties in the Hearing under the Order to Show Cause captioned above.

certain documents or information in redacted documents (together, the “Records”).

### 1. Filing and Service

Mr. Scot Stone of the FCC, by email on Thursday June 16, 2011, granted permission for this Reply to be filed on this date, Friday June 17, 2011 by mail with a copy also via email. Mr. Stone stated: “You may mail the pleading on Friday and concurrently provide an electronic copy.” Accordingly, this Reply will be mailed by close of today, Friday June 17, and a copy then provided by email: see Certificate of Service.

Also, while not required (as far as Skybridge can tell), a copy of the instant pleading will be filed under the MCLM application and under the Hearing docket captioned above.

### 2. Preliminary Response

By emails on May 20 and June 8, 2011, the undersigned, for Skybridge, submitted preliminarily replies to FCC staff, copying the Investigated Parties.

### 3. These Matters Previously Have Been Treated

The Request was denied initially, and also denied on administrative appeal (the “Appeal”)<sup>2</sup> by lack of response in time set by statute, noted below.<sup>3</sup>

As described in said Appeal and in the immediately below section: these matters have previously been covered: In early 2010, the FCC twice instructed the Investigated Parties as to Section 0.459 requirements, and the Investigated Parties responded, essentially the same as they have in the instant Responses.

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<sup>2</sup> Application or Review filed July 2, 2010 for Petitioners by Nossaman LLP (the “Appeal”). As it states, the Appeal was served on the Investigated Parties: to Donald Depriest, Dennis Brown for MCLM and Wireless Properties of Virginia, and Russel Fox for MariTel.

<sup>3</sup> Petitioners are adding said denial to their Complaint in their pending FOIA case against the FCC commenced with regard to preceding FCC denials of other information sought under FOIA regarding MCLM and affiliates (as to violations of law of the kind described in the OSC FCC 11-64). *Skybridge v. FCC* in the US District Court for the District of Columbia filed September 2, 2010.

The Responses fail under the requirements of Section 0.459 for the same reason explained in the Appeal.

4. The Investigated Parties Waived Any Rights to Confidentiality;  
And In Said Case, the FCC May Not Reinstate Potential Confidentiality;  
And The Parties Violated Ex Parte Rules in the Restricted Proceeding;

The FOIA Request sought records held by the FCC as result of required delivery of documents to the FCC from MCLM and affiliates under letters of investigation (and the investigation the continued after the letters) from the FCC Enforcement Bureau: letters dated February 26, 2010 from Gary Schonman (i) to Donald Depriest of Wireless Properties of Virginia, (ii) to Sandra Depriest of MCLM, and (iii) Jason Smith of Maritel (together, again, the “Parties”) (the “Initial Letters of Investigation”). The content of these three letters included an Attachment that included:

*Request for Confidential Treatment.* If you request that any information or documents responsive to this letter be treated in a confidential manner, it shall submit, along with all responsive information and documents, a statement in accordance with Section 0.459 of the Commission's rules. 47 C.F.R. § 0.459. Requests for confidential treatment must comply with the requirements of Section 0.459, including the standards of specificity mandated by Section 0.459(b). Accordingly, "blanket" requests for confidentiality of a large set of documents, and casual requests, including simply stamping pages "confidential," are unacceptable. Pursuant to Section 0.459(c), the Bureau will not consider requests that do not comply with the requirements of Section 0.459.

(the “Instruction and Warning”). None of the Investigated Parties submitted “a statement in accordance with Section 0.459” when providing the Records, since they only made generalized and conclusory claims regarding purported confidentiality. Thus the Investigated Parties all waived rights to assert confidential treatment by the FCC including under FOIA “Exemption 4” (5 U.S.C.S. § 552(b)(4)). On February 26, 2010, the Enforcement Bureau sent a follow-up letter of inquiry to the Investigated Parties, seeking additional information and documentation relating to the MCLM Investigation. This, again, contained the same Instruction and Warning, and again

the Investigated Parties submitted only generalized and conclusory claims regarding purported confidentiality. Thus again the Parties all waived rights to assert confidential treatment.

See the Appeal for further on the preceding Section-4 discussion.

Thereafter, the FOIA Request was unlawfully denied since on the above basis alone the Records could not be held confidential (and on the bases described below as well). There is nothing in FCC FOIA rules or in the said letters of investigation, or other authority, to allow the FCC to reinstate potential confidentiality.

In addition, Petitioners were named as parties in said Initial Letters of Investigation that instructed the Investigated Parties to provide their responses to said letters (and other presentations) to Petitioners, the only permissible exception being if confidential treatment was sought under the instruction above by “a statement in accordance with Section 0.459.” That was not sought, yet the Investigated Parties did not provide the Records to Petitioners, which thus violated the Letters of Investigation requirement that no ex parte presentations may be made in the proceeding under said letters (described therein as a restricted proceeding). The FCC has taken no action in response to these violations.

#### 5. Even Apart from Said Waiver, Withholding is Unlawful

See the Appeal. Also, as indicated in the Appeal and in numerous pleadings by Petitioners submitted in challenges against the Investigated Parties before the FCC, FOIA Exemption 4 does not allow the government to withhold documents sought, or portions of documents with information sought (together, the “Subject Information”) (the Records in this case, defined above) if the Subject Information is indisputably subject to mandatory and public submissions, even if the Subject Information is ordinarily of a class that is subject to Exemption 4 withholding.

In *Critical Mass Energy Project, Appellant v. Nuclear Regulatory Commission, et al.*, 975 F.2d 871. January 29, 1992, Argued En Banc, August 21, 1992, Decided ("*Critical Mass*"), the DC Circuit Court held (underlining added, other emphasis and items in brackets in original):

Commercial or financial matter is "confidential" . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.  
\* \* \* \*

On the facts of *National Parks*, we determined that, although the information being sought was customarily withheld from the public, "the Government had no apparent interest in preventing disclosure of the matter" as it was "supplied to the Park Service pursuant to statute." *Id.* at 770. We then held that since the concessioners are required to provide this financial information to the government, there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future,"....

[There is] a twofold justification for the exemption of commercial material: (1) *encouraging cooperation by those who are not obliged to provide information to the government* and (2) protecting the rights of those who must.  
\* \* \* \*

In summarizing these various purposes and justifications, we formulated the now familiar two-part test that defined as "confidential" any financial or commercial information whose disclosure would be likely either "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770 (footnote omitted). In applying this test to the facts of *National Parks*, we held that because the concessioners [were] required to provide this financial information . . . , there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future.

*Id.* (emphasis in original). Then, because the record was incomplete as to the competitive harm that might be suffered by the concessioners on the release of the information, we remanded for further findings on that question.  
\* \* \* \*

A distinction between voluntary and compelled information must also be made when applying the "competitive injury" prong. In the latter case, there is a presumption that the Government's interest is not threatened by disclosure because it secures the information by mandate; and as the harm to the private interest (commercial disadvantage) is the only factor weighing against FOIA's presumption of disclosure, that interest must be significant.

Under *Critical Mass*, there can be no harm asserted to the Government in release of information it required to be submitted. Further, there can be no competitive harm-- (not only

“no significant,” but none at all)-- asserted by the filer of the Subject Information where that had to be filed in a public filing.

In this case, all of the Subject Information (the Records) is information that the FCC required to be submitted to the FCC (1) by the auction rules applicable to Auction No. 61 applied to MCLM (as a self-asserted Designated Entity [“DE”] claiming a bidding discount credit) and (2) in the Enforcement Bureau’s investigation of the Investigated Parties for violations of those rules. The Enforcement Bureau had no right to seek, and did not seek, and Skybridge’s FOIA request for the Subject Information did not seek, any information that was not directly related to those required lawful public submissions.

When MCLM asserted DE status in its public Auction 61 short- and long- form applications, it assumed the legal obligation to submit certain financial information in the applications as to itself and affiliates, and further it had to submit amendments to the applications to correct false past information (which, to date, MCLM has not done, as stated in the Order to Show Cause..., FCC 11-64, 26 *FCC Rcd* 6520, 76 *FR* 30154 (the “OSC”)).

Thus, MCLM is not (and the other Investigated Parties, MCLM affiliates are not) entitled to have any of the Subject Information (the Records) withheld, nor can the FCC lawfully apply Exemption 4 to withhold the Records.

6. Sham Corporations, Sham Proceedings;  
and Unlawful Purposes and Effects:  
Withholding Improper

MCLM and the other Investigated Parties are “sham corporations” as shown in Petitioners’ pleadings challenging the MCLM Auction-61 long form, the application captioned above. This is also reflected clearly in the OSC. Under FOIA law as with other law, sham corporations (seeking liability protection and corporate status under relevant government law and procedures, but with the real nature of the entity and its control hidden, etc.), and sham actions

by entities before government, are not accorded legal rights and protections.<sup>4</sup> Thus, FOIA Exemption 4 which pertains only to legal entities does not apply to sham legal entities and sham actions before government.

Legal proceedings fall within the sham exception if, pursuant to an objective standard, the proceeding lacks probable cause. *Professional Real Estate*, 508 U.S. at 58 (“[T]he institution of legal proceedings ‘without probable cause’ will give rise to a sham if such activity effectively ‘bar[s] . . . competitors from meaningful access to adjudicatory tribunals and so . . . usurp[s] th[e] decisionmaking process.’” (quoting *Calif. Motor Transport*, 404 U.S. at 512) (omissions and alterations by Columbia Pictures)). The legal proceeding under the MCLM Long-Form captioned above, which ramified into branches including this FOIA proceeding and under that the position of the Investigated Parties (and the OSC branch also) – is a sham proceeding by said Investigated Parties, the gist of which is the MCLM attempt to unlawfully compete with and in some cases block Skybridge and Petitioners, as the OSC noted. The Investigated Parties are not entitled to protection either under the Noerr-Pennington doctrine or under FOIA Exemption 4, since their entities, purposes and actions are sham.

Also, the Records pertain to violations of law and unlawful purposes of MCLM and the other Investigated Parties, and related unlawful actions and purposes of the FCC as well. Under law, actions with unlawful effect or even unlawful purpose are accorded no legal protection and are *void ab initio* since, to begin with, they are against public policy. With regard to FOIA law:

[W]hen governmental misconduct is alleged as the justification for disclosure, the public interest is insubstantial *unless the requester puts forward compelling evidence* that the agency denying the FOIA request is engaged in illegal activity and shows that the information sought is necessary in order to confirm or refute that evidence."

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<sup>4</sup> For example, There is a "sham" exception to the Noerr-Pennington doctrine which holds that using the petitioning process simply as an anticompetitive tool without legitimately seeking a positive outcome to the petitioning destroys immunity. See *Omni*, 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344. This doctrine and said exemption extend beyond antitrust concerns, as is well established.

*Computer Professionals*, 72 F.3d at 905 (emphasis added). In the instant case, as shown in the OSC substance if not conclusions, FCC staff unlawfully accommodated the extensive rule violations, misrepresentations, and lack of candor of MCLM (and the other Investigated Parties) since the time in 2005 of the MCLM Short Form in Auction 61 (actually, prior thereto as shown in Petitioners challenge pleadings to the MCLM Long Form captioned above) to the date of the subject FOIA Request (and beyond).<sup>5</sup> No objective reviewer would find otherwise. Skybridge and the other Petitioners asserted and demonstrated this often in their proceedings against the MCLM Long Form captioned above and the related proceedings against the MCLM assignment applications captioned in the OSC and in other filings with the FCC.

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<sup>5</sup> This is further shown in the FCC denial of the subject FOIA Request of June 2, 2010, where the FCC concocted some new FOIA law, and voided other, to further protect the unlawful MCLM (and the other Investigated Parties') actions.

The FCC informed Skybridge that since the said parties asserted confidentiality to the FCC (but not in the required *showing* under §0.459 [actual showing- explanation under the listed criteria] and transmission thereof to Skybridge for reply), that “should you seek the information for which the three parties have sought confidential treatment, you should proceed under § 0.459(d)(1) of the Commission rules.”

However, that section does not come into play until the FCC delivers the Section 0.459 showing (or purported one) seeking confidentiality to the FOIA requester, Skybridge in this case, which was not done.

Nor did the FCC ever grant the alleged confidentiality request under §0.459(d)(2).

In sum, the FCC shifted its FOIA law, in this case, from disclosure-presumptive law to a concealment-continuation mechanism. It shifted the burden from the Investigated Parties' need to demonstrate confidentiality under Exemption 4 in these documents that *had to be provided* in this proceeding -- (which grew out of and effectively was part of *the fully public* 47 USC §309 proceeding under Petitioners challenge to the MCLM Long Form captioned above) --, to a burden placed on the FOIA Requester (who was a party also with a right to all presentations and information in this proceeding of decisional importance even without a FOIA request).



7. The Responses Are Frivolous and For Delay;  
This is a Pattern;  
And Sanctions Called For Under §1.52

See the second paragraph of the Responses dated May 31, 2011 by Dennis Brown for Donald Depriest and Wireless Properties of Virginia, and Sandra Depriest and MCLM (which these persons and entities assert, contrary to the evidence, are distinct): This paragraph is vague and appears interposed for further delay in violation of FCC rule §1.52. The Responses should thus by “stricken as sham and false” as this rule provides.

Said paragraph is vague since: (1) The first sentence states that there is no objection to disclosure of documents other than noted tax returns, but it does not identify these returns. (2) The next sentence raises objections to all other information for which confidential treatment was requested, but does not describe these either. And (3) these two sentences are mutually exclusive: in the first, all but the (unidentified) tax returns may be disclosed, but then “all other” (unidentified) information may not be disclosed.<sup>6</sup> This is nonsense like the Mad Hatter in *Alice in Wonderland*.

The last paragraph of these Responses is further nonsense. First, Mr. Brown cannot speak for Skybridge as he asserts. Second what he speaks is more nonsense: All government documents deal with the non-governmental persons (individuals and corporate) that government serves directly or indirectly. Government has no business simply gathering information on citizens apart from its public-servant functions. Further, said government records do not just “happen to be in government custody,” as if leaves that just blew in the government records yard. Mr. Brown finishes with the same sort of nonsense as in paragraph 2: “the Commission should

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<sup>6</sup> The Commission in another Section 308 Hearing said of Mr. Brown: “inadequate, evasive, and contrived to avoid full and candid disclosure to the Commission;” “a studied effort to avoid producing any information;” and “woefully inadequate.” *In the Matter of James A. Kay*, FCC 01-341, 17 FCC Rcd 1834; 2002 FCC LEXIS 409; 25 Comm. Reg. (P & F) 1015Rel. January 25, 2002. As for MariTel: Also under Donald Depriest control, the FCC found:

withhold from disclosure all requested information except documents other than tax returns....”

“Withhold all...except...other than” has no meaning, but evasion interposed for further delay.

MariTel is also (along with MCLM) controlled by Donald Depriest, and with its counsel has similarly in similar sanctionable nonsense, including petitioning against its own long form in the VPC auction, and with no cause against the undersigned in said auction.<sup>7</sup>

#### 8. Other

Further, the FCC should have long ago released the Records, as soon as each component were obtained, publicly and apart from the subject SSF FOIA request for the reasons noted above: This was information required to be filed with the FCC publicly.

SSF and its affiliates submitted the above argument, in summary, several dozen times already in the above captioned MCLM application proceeding, and in the petition to deny proceedings involving the other applications captioned in the OSC, and directly to the FCC in its above-noted appeal of the denial of the subject FOIA Request, and in other times and places.

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<sup>7</sup> See *Memorandum Opinion and Order*, DA 99-962, released May 19, 1999:

Thus, to the extent that the [MariTEL] Petition sought denial of MariTEL's long-form application, we find it not only procedurally deficient and inconsistent with the Commission's Rules but bordering on an abuse of process. Accordingly, we dismiss that portion of the Petition. We see some merit to Havens' suggestion that MariTEL should be sanctioned for its actions. Based on the facts presented it appears that MariTEL was using the Commission processes in a frivolous manner in filing such a petition. The apparent purpose was to delay the timing of its down payment deadline. We issue a stern warning to MariTEL and future auction participants that pleadings that appear designed to delay a bidder's payment obligation or avoid a payment obligation imposed by the Commission's competitive bidding rules (e.g., bid withdrawal or default payments) will be closely scrutinized for sanctionable conduct. We reserve the right to take enforcement action against MariTEL for its actions in this case.... We disagree with MariTEL's suggestion that the fact that Havens previously has not held a maritime license is a decisive factor bearing on his qualifications to be a VPC licensee, particularly given that the Commission explicitly decided to give new entrants the same opportunity as incumbents to acquire VHF public coast spectrum.

Respectfully submitted, June 17, 2011,



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Warren C. Havens, as President of  
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Cc: Petitioners in addition to Skybridge

Declaration

I, Warren C. Havens, hereby declare, under penalty of perjury, that the foregoing Consolidated Reply to Responses, including any exhibits and attachments, was prepared pursuant to my direction and control and that all the factual statements and representations of which I have direct knowledge contained herein are true and correct.



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Warren C. Havens

June 17, 2011

Certificate of Service

I, Warren Havens, certify that I have, on this 17<sup>th</sup> day of June 2011, caused to be served by placing into the USPS mail system with first-class postage affixed, unless otherwise noted, a copy of the foregoing Consolidated Reply to Responses, ~~including any exhibits and attachments,~~ to the following:<sup>8</sup>

Copies emailed Saturday 6.18.11.  
- W. Havens

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<sup>8</sup> The mailed copy being placed into a USPS drop-box today may not be processed by the USPS until the next USPS business day.

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